

RECEIVED
SUPREME COURT
STATE OF WASHINGTON

2008 MAY 14 P 2:00

BY RONALD R. CARPENTER

CLERK

No. 81332-9

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

RESIDENTS OPPOSED TO KITTITAS TURBINES,
KITTITAS COUNTY, and F. STEVEN LATHROP,

Petitioners,

v.

WASHINGTON STATE ENERGY FACILITY SITE EVALUATION
COUNCIL (EFSEC) and CHRISTINE O. GREGOIRE, Governor of the
State of Washington,

Respondents.

BRIEF OF *AMICI CURIAE*
ASSOCIATION OF WASHINGTON BUSINESS
NORTHWEST & INTERMOUNTAIN POWER
PRODUCERS COALITION

SUSAN K. ACKERMAN,
WSBA # 14139
Attorney at Law
9883 N.W. Nottage Drive
Portland, OR 97229
(503) 297-2392

KRISTOPHER I. TEFFT, WSBA #29366
General Counsel
CHRISTIAN M. McCABE, WSBA # 29532
Governmental Affairs Counsel
Association of Washington Business
1414 Cherry Street SE
PO Box 658
Olympia, WA 98507
(360) 943-1600

TABLE OF CONTENTS

I. INTRODUCTION	1
II. IDENTITY AND INTEREST OF <i>AMICI CURIAE</i>	2
A. ASSOCIATION OF WASHINGTON BUSINESS	2
B. NORTHWEST & INTERMOUNTAIN POWER PRODUCERS COALITION	2
III. ISSUE OF CONCERN TO <i>AMICI CURIAE</i>	4
IV. STATEMENT OF THE CASE	4
V. ARGUMENT	4
A. THE COURT SHOULD EXERCISE JURISDICTION AND EXPEDITE REVIEW OF THE STATE'S SITING DECISION	4
B. RECENT PUBLIC POLICY MANDATES AND PRACTICAL CONSIDERATIONS UNDERSCORE THE NEED FOR PROMPT JUDICIAL SITING APPROVAL FOR THIS RENEWABLE ENERGY FACILITY	7
VI. CONCLUSION	11

TABLE OF AUTHORITIES

Cases

<i>Lathrop v. State Energy Facility Site Evaluation Council</i> , 130 Wn. App. 147, 121 P.3d 774 (2005).....	5
<i>West Main Assoc. v. City of Bellevue</i> , 106 Wn.2d 47, 720 P.2d 782 (1986).....	6-7

Statutes

RCW 80.50.010	5
RCW 80.50.110	5
RCW 80.50.140	1, 6, 11
RCW 19.285.030	8
RCW 19.285.040	7
RCW 19.285.060	8
Laws of 2008 ch. 14.....	9-10

Secondary Authority

Washington State Department of Community, Trade and Economic Development 2006 Electric Utility Fuel Mix (2007).....	8
U.S. Department of Energy, National Renewable Energy Laboratory, Washington – Wind Power Resource Estimates (2002)	8
Brit T. Brown, <i>Wind Power: Generating Electricity and Lawsuits</i> , 28 Energy L.J. 489 (2007).....	11

I. INTRODUCTION

A substantial component of Washington's economic vitality and national and global competitiveness is the availability of abundant energy at a reasonable cost. In addition to availability and cost, our state's energy policy is also moving, as evidenced by recent legislative activity and an initiative of the people, toward renewable and alternative energy sourcing as worthy in itself and as a means of reducing greenhouse gas emissions.

These public policies require an emphasis on new developments in renewable energy generation, such as the wind project at issue here. They also require reliance on the part of businesses and developers on sure, certain, equitable rules and expeditious decision making for the approval, permitting, and siting of new energy facilities.

These dovetailing policy issues are at the heart of this case. Because of their broad public interest and impact on energy development and investment, *amici* Association of Washington Business ("AWB") and Northwest & Intermountain Power Producers Coalition ("NIPPC") respectfully urge the court to affirm, on an expedited basis, the determination of respondents Energy Facility Site Evaluation Council ("EFSEC") and Governor Christine Gregoire. The court should clearly indicate for future projects the appropriateness of expedited judicial decision making in siting cases that meet the criteria of RCW 80.50.140.

II. IDENTITY AND INTEREST OF *AMICI CURIAE*

A. ASSOCIATION OF WASHINGTON BUSINESS

AWB, founded in 1904, is the state's oldest and largest general business trade association. AWB represents over 6,600 member businesses, of whom 85 percent are small businesses employing fewer than 50 workers, and who are engaged in all aspects of commerce in Washington. In total, AWB members employ over 650,000 individuals in Washington. Acting as the state's chamber of commerce, AWB is an umbrella organization representing the interests of 114 trade and business associations engaged in industry-specific activities as well as 56 local and regional chambers of commerce across Washington.

AWB is at the forefront of legislative and regulatory advocacy for policies promoting and ensuring a reliability and economic competitiveness of the state's energy supply. AWB also advocates for a stable regulatory climate to encourage investment in the generation and transmission of the energy resources necessary to sustain and encourage economic development.

B. NORTHWEST & INTERMOUNTAIN POWER PRODUCERS COALITION

NIPPC, founded in 2002, is the region's advocate for independent power producers -- the non-utility, entrepreneurial developers of

electricity generating power plants. NIPPC members' customers are investor-owned and public utilities.

NIPPC members have built and/or operate nearly 4000 megawatts of power plants, enough electricity to power a city the size of Seattle three times over. In addition, NIPPC members have approximately another 2000 megawatts under various stages development in the Northwest – much of that in Washington.

Several NIPPC members have secured site certification agreements from EFSEC or are pursuing them at this time. Their development decisions have or will depend on the integrity of the Council to predictably execute its intended statutory obligations.

NIPPC is an active advocate for the competitive procurement of electric power by utilities. The Coalition is also on record in support of regulatory regimes that deliver clear and consistent enforcement of statutes affecting the siting and operation of power plants and the sale and distribution of the wholesale electricity they generate. The Coalition participates in proceedings at the Federal Energy Regulatory Commission, Bonneville Power Administration, Washington Utilities and Transportation Commission and Washington State Legislature.

III. ISSUE OF CONCERN TO *AMICI CURIAE*

Should the court exercise its constitutional and statutory jurisdiction to determine this matter on an expedited basis to provide clarity and certainty and effectuate the legislative policy manifest in EFSEC's special statutory permitting process?

IV. STATEMENT OF THE CASE

For the sake of brevity, *amici* adopt the Counterstatement of the Facts set forth by Respondent Sagebrush Power Partners, *Br. of Resp't* at 3-12.

V. ARGUMENT

A. THE COURT SHOULD EXERCISE JURISDICTION AND EXPEDITE REVIEW OF THE STATE'S SITING DECISION.

In addition to the reasons set forth by respondents for the court's proper jurisdiction and expedited review, *amici* further submit that strong public policy considerations support the court's expedited review of the matter.

First, expedited judicial review furthers, in a very direct way, basic components of our state's energy policy. As discussed in subsection V.B *infra*, our state's energy policy is based upon cost competitiveness, a growing demand for energy, and a move toward alternative and renewable sources of energy. The Legislature has accounted for the time-sensitive

planning, investing, and developing of facilities to further these policies in the basic statutory purpose of EFSEC:

It is the intent [of the Legislature] to seek courses of action that will balance the increasing demands for energy facility location and operation in conjunction with the broad interests of the public. Such action will be based on these premises: . . .

. . . To provide abundant energy at reasonable cost.

. . . To avoid costly duplication in the siting process and ensure that decisions are made timely and without unnecessary delay.

RCW 80.50.010(3), (5). *Lathrop v. State Energy Facility Site Evaluation Council*, 130 Wn. App. 147, 151, 121 P.3d 774 (2005). This intent to expedite decision making and avoid duplication and delay is emphatically present in the preemptive power of EFSEC:

(1) If any provision of this chapter is in conflict with any other provision, limitation, or restriction which is now in effect under any other law of this state, or any rule or regulation promulgated thereunder, this chapter shall govern and control and such other law or rule or regulation promulgated thereunder shall be deemed superseded for the purposes of this chapter.

(2) The state hereby preempts the regulation and certification of the location, construction, and operational conditions of certification of the energy facilities included under RCW 80.50.060 as now or hereafter amended.

RCW 80.50.110. It is important for energy siting decisions to be expeditiously reviewed, and reviewed in light of EFSEC's preemptive reach, in order to fulfill the council's statutory mandate to allow for the provision of "abundant energy at reasonable cost."

Secondly, expedited judicial review is critical given that it comes at the end of the permitting process, when factual issues concerning environmental constraints have been largely adjudicated and practical considerations come into play. As discussed below in more specific detail with respect to wind facilities, site preparation and delivery of the critical infrastructure components of a project require scheduling and coordination that is extremely time sensitive. This is particularly true in the current marketplace where, given the surging demand for renewable energy and increasing fuel costs, the cost of equipment is escalating and equipment orders must be secured long before construction begins.

Third, the prospect of delays and uncertainty in the permitting process engendered by a lengthy judicial review process could have a chilling effect on new projects to meet the state's growing energy needs. Future applicants and investors will necessarily have to factor into decision making the higher costs and delays experienced by preceding projects. Applicants unsure about the availability of an expedited review process when the criteria of RCW 80.50.140 are met will be reluctant to make the investments in energy infrastructure our state needs.

This court has very memorably articulated the principle that “[s]ociety suffers if property owners cannot plan developments with reasonable certainty, and cannot carry out the developments they begin.”

West Main Assoc. v. City of Bellevue, 106 Wn.2d 47, 51, 720 P.2d 782 (1986). *Amici* submit that principle is very specifically implicated in this case. Energy developers are already anxiously awaiting the outcome of this case as an indicator of the regulatory climate for future energy investment in Washington.

B. RECENT PUBLIC POLICY MANDATES AND PRACTICAL CONSIDERATIONS UNDERSCORE THE NEED FOR PROMPT JUDICIAL SITING APPROVAL FOR THIS RENEWABLE ENERGY FACILITY.

In November, 2006, Washington voters approved Laws of 2007, ch. 1 (Initiative Measure No. 937), which requires, *inter alia*:

Each qualifying utility shall use eligible renewable resources or acquire equivalent renewable energy credits, or a combination of both, to meet the following annual targets: (i) At least three percent of its load by January 1, 2012, and each year thereafter through December 31, 2015; (ii) At least nine percent of its load by January 1, 2016, and each year thereafter through December 31, 2019; and (iii) At least fifteen percent of its load by January 1, 2020, and each year thereafter.

Laws of 2007, ch. 1, § 4 (codified at RCW 19.285.040).

This portfolio standard for renewable energy mandates the use of specified percentages of “eligible renewable resources” or “renewable energy credits” by qualifying utilities in Washington by targeted dates. However, while Washington presently derives nearly 70 percent of its

electricity from existing hydropower,¹ only hydropower facilities built after March of 1999 and incremental upgrades to existing facilities qualify under I-937 as eligible renewable resources. RCW 19.285.030(10)(a), (b). Most of Washington's hydropower generation, accordingly, does not qualify as an eligible renewable resource. By contrast, wind power, such as the project at issue here, unqualifiedly counts as an eligible renewable resource, RCW 19.285.030(18)(b), and is therefore a desirable energy source under I-937.

In the event a qualifying utility does not meet the standards set forth above, the utility must pay an administrative penalty of \$50 per megawatt hour of shortfall to the state. RCW 19.285.060(1). Provided certain criteria are met, RCW 19.285.060(4)-(7), that penalty may be passed on to consumer ratepayers.

While projects like respondent's are desirable under I-937, economically viable wind energy sites are limited in our state.² As it is, Washington is ranked in the lower tier of the nation with respect to wind energy potential. Administrative Record ("AR") at 9999. The Ellensburg

¹ See Washington State Department of Community, Trade and Economic Development 2006 Electric Utility Fuel Mix (2007), <http://www.cted.wa.gov/DesktopModules/CTEDPublications/CTEDPublicationsView.aspx?tabID=0&ItemID=4696&MIId=863&wversion=Staging> (last viewed May 13, 2008).

² See, e.g., U.S. Department of Energy, National Renewable Energy Laboratory, Washington – Wind Power Resource Estimates (2002), http://www.eere.energy.gov/windandhydro/windpoweringamerica/images/windmaps/wa_50m_800.jpg (last viewed May 13, 2008).

corridor in Central Washington, where EFSEC and the Governor have approved siting of this facility, contains one of the strongest wind energy resources in the state coupled with an abundance of existing transmission lines. *Id.* So, in order to comply with the policy and mandate of I-937 without reference to existing hydropower resources, energy companies must look to projects such as respondent's to achieve compliance and avoid costly penalty. The existence of a regulatory climate that is supported by prompt judicial determination of siting controversies furthers the state's move toward renewable and alternative energy.

In addition to the voters' approval of I-937, the Legislature has solidified the state's preference for renewable energy with the enactment of Laws of 2008, ch. 14 (Engrossed Second Substitute House Bill (E2SHB) 2815). E2SHB 2815, which is premised on the statewide reduction of greenhouse gas emissions, requires that:

The state shall limit emissions of greenhouse gases to achieve the following emission reductions for Washington state: (i) By 2020, reduce overall emissions of greenhouse gases in the state to 1990 levels; (ii) By 2035, reduce overall emissions of greenhouse gases in the state to twenty-five percent below 1990 levels; (iii) By 2050, the state will do its part to reach global climate stabilization levels by reducing overall emissions to fifty percent below 1990 levels, or seventy percent below the state's expected emissions that year.

Laws of 2008, ch. 14, § 3. As noted above, Washington derives nearly 70 percent of its electricity from hydropower, which requires virtually no

emission of greenhouse gas to produce. For this reason, Washington is unique among its regional neighbors in that greenhouse gas emission from in-state electricity generation is extremely low. Accordingly, it will be comparatively more difficult for Washington to meet the hard limits outlined in E2SHB 2815 than for neighbors meeting similarly imposed reduction targets. So to reach these standards and remain economically competitive regionally, nationally, and globally, Washington must maximize its opportunities to source energy generation with low greenhouse gas emissions – such as wind.

So while the public policy of the state is pushing toward projects like wind, a typical wind power project presents a clear example of how even short delays in judicial decision making can translate into substantial practical delays and increased cost. In order for power producers and utilities to enter into definitive power purchase agreements to meet energy demands, a great deal of complexity has to synchronize well in advance of a facility coming on line. Production slots for wind turbines must be contracted at least a year in advance of delivery, while purchase and scheduling transport of turbines must be accomplished equally in advance. Because of their very large size, storage of wind turbines is difficult and expensive, and given the shortage of equipment designed to handle them, transportation is complicated and expensive. Site roads and turbine

foundations must be prepared in advance for delivery, yet there is a limited seasonal window in which site preparation can be accomplished due to weather, wildlife mitigation, and other factors. Missing the site preparation window by a month can cause a delay of several months. *See* Brit T. Brown, *Wind Power: Generating Electricity and Lawsuits*, 28 Energy L.J. 489, 499 (2007) (describing capital investment risk inherent in ordering turbines in advance to minimize construction delay while litigation is pending). These are complex circumstances under normal conditions; the uncertainty of an unresolved legal dispute only exacerbates the uncertainty and increases the challenge of bringing needed resources on line.

A public policy push toward projects like wind power, combined with the enormous scale, complexity, and time-sensitive exigencies of the project itself, weigh strongly in favor of this court resolving petitioners' challenge as expeditiously as possible and, for the sake of future project proponents, clearly indicating its intent to exercise its jurisdiction and expedite its decision in energy siting cases where the criteria of RCW 80.50.140 are met.

VI. CONCLUSION

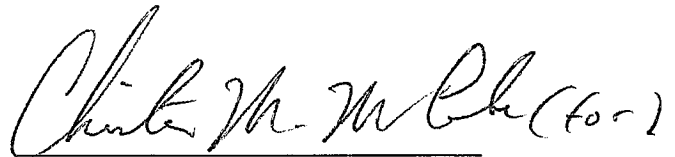
Amici AWB and NIPPC respectfully request the court exercise its constitutional and statutory authority to hear this matter, engage in a

prompt and expeditious review, reject the petitioners' contentions and affirm the Governor's approval of the site certification agreement for the Kittitas Valley Wind Power Project.

Respectfully submitted this 14th day of May, 2008.



Kristopher I. Tefft, WSBA #29366
Christian M. McCabe,
WSBA#29352
ASSOCIATION OF
WASHINGTON BUSINESS
1414 Cherry Street SE
Olympia, WA 98501
(360) 943-1600



Susan K. Ackerman, WSBA#14139
ATTORNEY AT LAW
9883 NW Nottage Drive
Portland, OR 97229
(503) 297-2392